IN THE

Supreme Court of the United States

October Term, 1976

No. 75-1037

ROBERT L. WADE,

Petitioner,

v.

WALTER HENKENBERNS,
MICHAEL CARNEY
and
THE CITY OF CINCINNATI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

WHITE & GETGEY CO., L.P.A.
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THE JOHNSON & HARDIN CO., LAW PRINTERS
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TABLE OF CONTENTS

CASES CITED

CONSTITUTION, STATUTES AND RULE

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner, Robert L. Wade, prays for a writ of certiorari to review the judgment of the Supreme Court of Ohio in this case.

OPINIONS BELOW

The judgment of the Supreme Court of Ohio was rendered without an opinion and is unreported. The opinion of the Court of Appeals, First Appellate District of Ohio has not been officially reported. The opinion of the

Court of Common Pleas, Hamilton County, Ohio is unreported. The judgment of the Supreme Court, the Court of Appeals, and the Court of Common Pleas are reproduced in the Appendix at pages 15, 16, 10, 9 respectively.

JURISDICTION

A Motion for an Order Directing the Court of Appeals for Hamilton County to certify its record was overruled by the Supreme Court of Ohio on February 13, 1976. On the same date the Supreme Court of Ohio entered judgment in favor of defendants.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where agents, servants and employees of the City of Cincinnati commit negligence, carelessness and reckless misconduct as a result of which serious injury occurs to an innocent victim, that victim has the right to recover damages against the City of Cincinnati, and such action is not barred by the Doctrine of Governmental Immunity which denies equal protection and benefit of the law to the people of this state in that it is violation of Section 2 and 16, Article I of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

Additionally, where the Supreme Court of Ohio dismisses such appeal "for the reason that no substantial constitutional question exists herein," despite the existence of substantial constitutional issues, the within cause should be remanded to the Ohio Supreme Court for a hearing on the merits.

CONSTITUTIONAL PROVISIONS

Article I, Sec. 2 of the Ohio Constitution of 1851, in pertinent part:

> "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly."

Article I, Sec. 16 of the Ohio Constitution of 1851, in pertinent part:

> "All Courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

Article VIII, Sec. 7 of the Ohio Constitution of 1802, in pertinent part:

> "That all Courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by the due course of law, and right and justice administered, without denial or delay."

Fourteenth Amendment of the United States Constitution in pertinent part:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On July 28, 1972, plaintiff-appellant, Robert L. Wade, filed a Complaint, for money only, in the Court of Common Pleas, Hamilton County, Ohio, the same being Case No. A-725528. Therein it was alleged in substance that the

plaintiff-appellant's left eye was grievously injured and blinded on August 10, 1970, as a result of the negligence and carelessness of agents and employees of defendant-appellee, City of Cincinnati. Subsequently defendant-appellee, City of Cincinnati, filed a Motion to Dismiss it as a party defendant for the reason that defendant, City of Cincinnati, is immune for tort liability in this action by virtue of governmental immunity.

Thereafter, oral argument was heard by the Hamilton County Common Pleas Court on September 16, 1974, at which time the Court found that the Motion to Dismiss of Defendant, City of Cincinnati, was meritorious and should be sustained. Thereafter, an Entry Granting the Defendant, City of Cincinnati, Motion to Dismiss was filed, with exceptions reserved, and plaintiff-appellant timely filed a Notice of Appeal from the Entry Granting the Motion.

This matter was subsequently heard by the Court of Appeals, First Appellate District of Ohio, Case No. C-74560 on appeal by plaintiff-appellant, Robert L. Wade, on the plaintiff-appellant's original pleading whose claim states a cause of action in the State of Ohio. The Court of Appeals in a decision dated October 27, 1975, affirmed the order of the trial court.

On February 13, 1976, a Motion for an Order Directing the Court of Appeals to certify its Record was overruled. On the same date the Supreme Court of Ohio dismissed appellant's appeal, without opinion, on ground that no substantive constitutional question was involved.

REASONS TO GRANT CERTIORARI

To Consider Question 1

SUMMARY

I. The Doctrine of Governmental Immunity clearly violates Section 2 of Article I of the Ohio Constitution and

the 14th Amendment of the United States Constitution by denying equal portection of the law to the people of the State of Ohio by its grant of special privilege and immunity to municipal corporations.

II. The Doctrine of Governmental Immunity clearly violates Section 16 of Article I of the Ohio Constitution in that said Doctrine closes the courts and denies remedy by due course of law to some, while others who are injured by negligent acts are entitled to seek such legal redress through the courts.

III. The issue raised in this matter is of great general interest because the ancient Doctrine of Governmental Immunity is an anachronism without rational basis.

I

The First District Appellate Court of Appeals, held, and the Supreme Court of Ohio affirmed, without opinion, in effect, that equal protection of the law, as pronounced in Article I, Sections 2 and 16 of the Ohio Constitution, and the 14th Amendment of the United States Constitution, is not available to the people of the State of Ohio who are injured by the negligent acts of employees and agents of municipal corporations. The Court below relied heavily, if not solely, on the doctrine of stare decisis to support its decision.

In the past twenty years, there has been an ever growing trend in the United States toward more responsible government and the abrogation of governmental immunity. Many states have judicially abrogated the doctrine of governmental immunity, on the basis that this doctrine violates equal protection of the law. *Ayala* v. *Philadelphia Board of Public Education*, 305 A2d 877 (Sup. Ct. Pa. 1973), *Becker* v. *Beaudon*, 106 R.I. 562 A2d 896 (1970), *Haney* v. *City of Lexington*, 386 S.W. 2d 738 (Ky. 1964), *Hargrove*

v. *Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957), *Kitto* v. *Minot Part District*, 224 N.W.2d 795 (Sup. Ct. N.D. 1974), *Merrill* v. *City of Manchester*, 332 A2d 378 (Sup. Ct. N.M. 1974), *Molitor* v. *Kaneland Community Unit District No. 302*, 18 Ill 2d 11, 163 N.E. 2d 89 (1959), *Muskopf* v. *Corning Hospital District*, 55 C.2d 211, 11 Cal. Rptr. 89 (1961), *Rice* v. *Clark County*, 382 P. 2d 605 (Nev. 1963), *Stone* v. *Arizona Highway Commission*, 93 Ariz. 384, 381 P. 2d 107 (1963), *Williams* v. *City of Detroit*, 364 Mich. 231, 111 N.W. 2d 1 (1961).

That the principle that "The King can do no wrong" is totally contrary and repugnant to our concepts of justice in the twentieth century, goes without saying. Such a principle is totally inconsistent with the concepts of due process and equal protection of the law.

A decision by this Court, to abrogate the Doctrine of Governmental Immunity, would lay to rest, once and for all, a complex area of law, which is obviously an unfair concept and a violation of the equal protection of the law.

II

Article I, Section 16 of the Ohio Constitution states that, "All Courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

In several of the states, the decision to abrogate the Doctrine of Governmental Immunity, was based, not only upon the equal protection clause of the particular state constitution and the 14th Amendment of the United States Constitution but also upon a clause in their respective Constitutions which parallel Article I, Sec. 16 of the Ohio Constitution. *Holytz* v. *City of Milwaukee*, 17 Wis.2d 26,

115 N.W.2d 618 (1962), *Kitto* v. *Minto Park District*, *supra*, *Williams* v. *City of Detroit*, *supra*.

Again, a decision by this Court, to abrogate the Doctrine of Governmental Immunity would lay to rest what is an unfair concept and a violation of Art. I, Sec. 16 of the Ohio Constitution.

III

In addition to the above reasons for abrogating the Doctrine of Governmental Immunity, numerous courts have supplemented the rationale for their decisions in holding that the Doctrine is an anachronism without rational basis. *Campbell* v. *State of Indiana*, 284 N.E.2d 733 (Sup. Ct. Ind. 1972), *Collopy* v. *Newark Eye and Ear Infirmary*, 27 N.J. 29, 141 A2d 276 (1958), *Haney* v. *City of Lexington*, *supra*, *Kitto* v. *Minto Park District*, *supra*, *Molitor* v. *Kaneland Community Unit District No. 302*, *supra*, *Muskopf* v. *Corning Hospital District*, *supra*, *Rice* v. *Clark County*, *supra*, *Spanel* v. *Mounds View School District No. 621*, 118 N.W. 2d 795 (Minn. 1962), *Stone* v. *Arizona Highway Commission*, *supra*.

> As was stated in the *Muskopf* case, *supra*, "the rule of governmental immunity for tort is an anachronism, without rational basis, and has existed only by the force of inertia. . . ."

CONCLUSION

Because this case squarely presents a serious issue of common interest to all the people of the State of Ohio, and because the decisions below are in such conflict with Article I, Sections 2 and 16 of the Ohio Constitution, and the 14th Amendment of the United States Constitution it is respectively submitted that the writ for which this petitioner prays be issued.

In the alternative, petitioner respectfully requests that the case be remanded to the Supreme Court of Ohio for a hearing on the merits for the reason that there does exist substantial constitutional issues herein.

Respectfully submitted,

JOHN J. GETGEY, JR.
615 Provident Tower
Cincinnati, Ohio 45202
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Ohio were sent this 10th day of May, 1976, by regular U.S. Mail, or Air Mail, in accordance with Rule 33 of the Rules of Practice of the Supreme Court of the United States, to the following:

THOMAS A. LUEBBERS
City Solicitor

TIMOTHY L. BONSCAREN
Assistant City Solicitor

DONALD E. HARDEN
Special Council
Room 214—City Hall
Cincinnati, Ohio 45202

Attorney for Defendants-Respondents

APPENDIX

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

ROBERT L. WADE,
Appellant,

v.

WALTER HENKENBERNS *et al.*,
Appellees.

1976 TERM

To wit: February 13, 1976

No. 75-1118

APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this .... day of ..... 19...
..... Clerk
..... Deputy

APPENDIX B

COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-74560

ROBERT L. WADE,

Plaintiff-Appellant,

v.

WALTER HENKENBERNS, MICHAEL CARNEY, JOHN YORGAVIN, JOSEPH HOFFMAN, and THE CITY OF CINCINNATI,

Defendants-Appellees.

NOTICE OF APPEAL

Notice is hereby given that Robert L. Wade, plaintiff-appellant, hereby appeals to the Supreme Court of Ohio from the decision of the First District Court of Appeals entered in this action on the 27th day of October, 1975.

This case involves a question of public and great general interest as well as a substantial constitutional question.

WHITE & GETGEY CO., L.P.A.
By: /s/ JOHN J. GETGEY, JR.

JOHN J. GETGEY, JR.
Trial Attorney for Plaintiff-Appellant
615 Provident Tower
One East Fourth Street
Cincinnati, Ohio 45202
Phone: 513-241-3685

THOMAS A. LUEBBERS
City Solicitor

TIMOTHY L. BOUSCAREN
Assistant City Solicitor

DONALD E. HARDIN
Special Counsel
Attorneys for Defendants-Appellees
Room 214—City Hall
Cincinnati, Ohio 45202

This is to certify that on the 25th day of November, 1975, a copy of the Notice of Appeal was sent by regular U. S. mail to the above attorneys for the defendants-appellees.

WHITE & GETGEY CO., L.P.A.
By: /s/ JOHN J. GETGEY, JR.

JOHN J. GETGEY, JR.
Trial Attorney for Plaintiff-Appellant

APPENDIX C

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO,
City of Columbus.

ROBERT L. WADE,

Appellant,

v.

WALTER HENKENBERNS *et al.*,

Appellees.

1976 TERM

To wit: February 13, 1976

No. 75-1118

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR HAMILTON COUNTY TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by White & Getgey.

.....

.....

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this .... day of ..... 19...
..... Clerk
..... Deputy

APPENDIX D

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-74560

ROBERT L. WADE,

Plaintiff-Appellant,

v.

WALTER HENKENBERNS, MICHAEL CARNEY, JOHN YORGOVAN, JOSEPH HOFFMANN and THE CITY OF CINCINNATI,

Defendants-Appellees.

DECISION

October 27, 1975

MESSRS. WHITE & GETGEY, JOHN J. GETGEY, JR. *of counsel*, 615 Provident Tower, Cincinnati, Ohio 45202, *for Plaintiff-Appellant*,

MESSRS. THOMAS A. LUEBBERS, TIMOTHY L. BOUSCAREN and DONALD E. HARDIN, Room 214, City Hall, Cincinnati, Ohio 45202, *for Defendants-Appellees.*

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Hamilton County Court of Common Pleas, tran-

script of the proceedings, a sole assignment of error, briefs and oral arguments of counsel.

Plaintiff-appellant, Robert L. Wade, hereinafter referred to only as appellant, commenced an action for personal injuries sustained by him while in custody of the Cincinnati Police Department. The complaint named certain individual police officers and the City of Cincinnati, hereinafter referred to as the City, as defendants. In the trial court the City prevailed on a motion to dismiss. Thereafter, the cases against the individual defendants were disposed of either by the trial court's rulings on motions or by jury verdict. None of the individual defendants was found to be liable to the appellant.

The sole assignment of error postulates prejudice in the court's granting of the City's motion to dismiss, thus challenging the doctrine of governmental immunity which the City, as a municipal corporation, enjoys.

The law of this state is well established (and counsel for appellant so concedes) that a municipal corporation is not liable for the torts of its policemen.

> A municipality cannot under ordinary circumstances incur any liability by reason of the defaults of its police department or the acts of the personnel thereof. The creation and maintenance of a police department by a municipality are done in the exercise of its governmental functions, and the municipality is not, in the absence of statutory provision, liable in damages for injuries resulting from the negligence of such department, or any of its members. The performance of an act by an official of a municipal police department is not the performance of a ministerial act for which the municipality becomes liable under the maxim 'respondent superior' . . .
>
> . . . . Nor is a municipality liable for torts committed by police officers in making arrests. . . . 39 O Jur 2d, § 435 MUNICIPAL CORPORATIONS.

Furthermore, the Ohio Supreme Court, as recently as July, 1972, has indicated a recognition of a continuing vitality of the concept of sovereign immunity. In *Krause, Admr.*, v. *State* (1972), 31 Ohio St. 2d 132 the Court held:

> The state of Ohio is not subject to suits in tort in the courts of this state without the consent of the General Assembly.

We are not unaware of the technical distinction between the "sovereign" immunity of the State of Ohio and the "governmental" immunity of its political subdivisions. However, it is manifest to us that the theory behind both concepts is identical and that the pronouncements in *Krause* are relevant and provide current guidelines as to the present status of the law in governmental immunity.

It follows that the assignment of error must be overruled. We affirm.

SHANNON, P. J. and KEEFE, J.

PALMER, J., CONCURRING:

Were we free to consider this matter as appellant would have us consider it, solely on its merits and without reference to *stare decisis* or, more particularly, without reference to the necessarily subordinate position of this Court to the Supreme Court of this State, I would be strongly persuaded by the cases, among many others of *Hicks* v. *New Mexico*, 44 U.S.L.W. (N.M. Sept. 26, 1975), *Ayala* v. *Philadelphia Board of Education*, 305 A. 2d 877 (Pa. 1973), and *Marusa* v. *District of Columbia*, 484 F. 2d 828 (D.C. Cir. 1973), and the concurring opinion of Justice Gibson in *Hack* v. *City of Salem*, 174 Ohio St. 383, 391 (1963) that the ancient doctrine of governmental immunity is, indeed, an "anachronism, without rational basis." *Id.* at 398. The public policy which once provided, or was

said to provide, its fundament, now, it would seem to me, argues for its quiet extinction.

As my brothers quite properly hold, however, the issue is not one of first impression. Far from it, precedent in this State, and from the highest Court in this State, is admittedly well established contra to the position of appellant. As observed by Justice Corrigan in his concurring opinion in *Krause* v. *State*, supra, at pp. 148-9, quoting 21 C.J.S. COURTS § 197:

> Decisions of a court of last resort are to be regarded as law and should be followed by inferior courts, whatever the view of the latter may be as to their correctness. . . .

If the law of governmental immunity is destined to be modified, it is clear that it must be accomplished by the General Assembly or by the highest court in this State, and not in this forum. I therefore concur in the judgment of the majority herein.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX E

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-725528

ROBERT L. WADE,

Plaintiff,

v.

WALTER HENKENBERNS
and
MICHAEL CARNEY
and
JOHN YORGOVAN
and
JOSEPH HOFFMANN
and
THE CITY OF CINCINNATI, OHIO,

Defendants.

JUDGMENT ENTRY

This action came on for trial before the Court and a duly impanelled jury on September 16, 18, 19, 20 and 23, 1974, at which time the issues were duly tried and the jury rendered its verdict on September 23, 1974.

In conformity with the verdict of the jury, IT IS ORDERED AND ADJUDGED that the plaintiff take

nothing; that the action be dismissed on the merits; and that defendant, Walter Henkenberns, the sole remaining defendant, recover of the plaintiff, Robert L. Wade, his costs of the action.

/s/ TIMOTHY L. BOUSCAREN

TIMOTHY L. BOUSCAREN
Assistant City Solicitor

/s/ DONALD E. HARDIN

DONALD E. HARDIN
Special Counsel
Attorneys for Defendants

/s/ JACK HEALY

WHITE & GETGEY CO., L.P.A.
Attorneys for Plaintiff
By: JACK HEALY

APPENDIX F

POSITION OF STATES[1] WITH REGARD TO THE DOCTRINE OF GOVERNMENTAL IMMUNITY

Judicially Abrogated	*Statutorily Abrogated*	*Modified*	*Insurance-Waiver Theory*
Alaska	Hawaii	Connecticut	Georgia
Arizona	Iowa	Sonth Carolina	Kansas
California	New York	Texas	Maine
Colorado	Oklahoma		Mississippi
Florida	Oregon		Missouri
Idaho	Utah		Montana
Illinois	Washington		North Carolina
Indiana			North Dakota
Kentucky			Ohio
Louisiana			Tennessee
Michigan			Vermont
Minnesota			Wyoming
Nebraska			
Nevada			
New Hampshire			
New Jersey			
Pennsylvania			
Rhode Island			
West Virginia			
Wisconsin			
District of Columbia			
New Mexico			

Common Law

Alabama	Massachusetts
Arkansas	South Dakota
Delaware	Virginia
Maryland	

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[1] This compilation is based on material presented in Restatement, Second, Torts § 895A at 12-20 (Tentative Draft, March 30, 1973, and is cited by the Pennsylvania Supreme Court in *Ayala* v. *Philadelphia Board of Public Education*, 305 A.2d 877, at 883 (1973); and also cited in *Hicks* v. *New Mexico*, 44 U.S.L.W. (N.M. Sept. 26, 1975. It has been updated to October 30, 1975).